Big Y Foods, Inc. *and* Local 371, United Food and Commercial Workers, AFL–CIO a/w United Food and Commercial Workers International Union, AFL–CIO. Cases 34–CA–6292, 34–CA–6305, and 34–CA–6427

December 21, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The principal issue presented here is whether the judge correctly found that the Respondent violated Section 8(a)(1) of the Act by discriminatorily denying nonemployee union representatives access to private property surrounding the Respondent's grocery stores.[1] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Big Y Foods, Inc., Springfield, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Discriminatorily denying representatives of Local 371, United Food and Commercial Workers, AFL–CIO a/w United Food and Commercial Workers International Union, AFL–CIO, access to our property for the purposes of solicitation and picketing.''

2. Delete paragraph 2(a) and reletter subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminatorily deny access to our property to the representatives of Local 371, United Food and Commercial Workers, AFL–CIO, a/w United Food and Commercial Workers International Union, AFL–CIO, for the purposes of solicitation and picketing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

BIG Y FOODS, INC.

John Gross, Esq., for the General Counsel.
Ralph F. Abbott, Esq. and *Richard Stubbs, Esq.*, of Springfield, Massachusetts, for the Respondent.
Sidney Fox, Esq., of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. The original charge in Case 3–CA–18078 was filed by Local 371, United Food and Commercial Workers, AFL–CIO a/w United Food and Commercial Workers International Union, AFL–CIO (the Union) on August 24, 1993, and a copy was served on Big Y Foods, Inc. (the Respondent) on August 24, 1993.

The original charge in Case 3–CA–18091 was filed by the Union on September 7, 1993, and a copy was served by certified mail on the Respondent on September 7, 1993.

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[1] On July 22, 1994, Administrative Law Judge Lowell M. Goerlich issued the attached decision. Both the Respondent and the General Counsel filed exceptions and supporting briefs. The General Counsel and the Charging Party also filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Respondent excepts to the judge's recommendation that it post copies of the Board's remedial notice at all of its store properties, rather than at only the six stores where the Respondent actually denied access to the Union. We find a companywide posting requirement appropriate in light of the judge's finding that the Respondent unlawfully denied access at the six stores pursuant to companywide solicitation guidelines which discriminatorily exclude unions. On the other hand, we find no need in this case for the judge's recommended remedial provision requiring the Respondent to grant the Union access to its premises for the purpose of making up for those times that the Respondent unlawfully denied access. In accord with Board remedial precedent for the unlawful discriminatory denial of access to an employer's private property, we shall delete the affirmative access requirement and order the Respondent to cease and desist from such unlawful conduct. See, e.g., *Richards United Super*, 308 NLRB 201, 202–203 (1992).

On September 13, 1993, the General Counsel issued an order transferring case from Region 34 to Region 3 in Case 34–CA–6292 and assigning it Case 3–CA–18078.

On September 13, 1993, the General Counsel issued an order transferring case from Region 34 to Region 3 in Case 34–CA–6305 and assigning it Case 3–CA–18091.

An order consolidating cases, consolidated complaint and notice of hearing was issued on October 29, 1993.

The original charge in Case 1–CA–31109 was filed by the Union on November 10, 1993, and a copy was served by certified mail on the Respondent on November 18, 1993.

The amended charge in Case 1–CA–31109 was filed by the Union on January 10, 1994, and a copy was served by certified mail on the Respondent on January 12, 1994.

A complaint and notice of hearing was issued on January 24, 1994.

On February 7, 1994, the following order was issued:

> An order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued in Case Nos. 34–CA–6292 and 6305 (formerly 3–CA–18078 and 18091) on October 29, 1993, and Complaint and Notice of Hearing issued in Case No. 34–CA–6427 (formerly 1–CA–31109) on January 24, 1994, alleging that Big Y Foods, Inc. has been engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 29 U.S.C. 151 et seq. Based thereon, and in order to avoid unnecessary costs or delay, the General Counsel, by the undersigned, pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board, ORDERS that these cases are further consolidated.

The consolidated complaint and the complaint alleged that the Respondent discriminatorily prohibited representatives of the Union from picketing and/or handbilling on the sidewalk in front of its stores by demanding that they leave the premises and by causing the police to threaten them with arrest all in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

The Respondent filed timely answers denying that it had engaged in the unfair labor practices alleged.

The matter was heard on May 10 and 11, 1994, at Hartford, Connecticut. Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF RESPONDENT

At all material times, the Respondent, a Massachusetts corporation with its principal place of business located at 280 Chestnut Street, in the city of Springfield, Commonwealth of Massachusetts, and grocery stores at various locations, including Torrington, Connecticut (the Torrington store); Seymour, Connecticut (the Seymour store); East Longmeadow, Massachusetts (the East Longmeadow store); Longmeadow, Massachusetts (the Longmeadow store); Wilbraham Road, Springfield, Massachusetts (the Wilbraham Road store); and St. James Avenue, Springfield, Massachusetts (the St. James Avenue store), has been engaged in business as a grocery store chain.

Annually, in the course and conduct of its operations at its various facilities, including the above-named stores, the Respondent derives gross revenues in excess of $50,000 from points outside the State of Connecticut.

At all material times, the Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Facts*

The pertinent facts are as follows:

(A) Union representatives attempted to pass out literature on the Respondent's property which urged potential customers not to patronize the Respondent's stores which were nonunion but to patronize stores which were union at the Seymour, Torrington, East Longmeadow, Longmeadow, Wilbraham Road, and St. James Avenue stores.

In the summer months of 1993, Peter J. Sena, union representative and organizer, went to the Torrington store for the purpose of distributing a ''Please do not patronize'' leaflet. He began handbilling 25 feet from the ''front entrance of the store.'' At the time a ''preacher'' was ''collecting food and distributing literature for the homeless, soliciting donations'' at about 20 feet from the store entrance. He was sitting at a card table in line where persons from whom he asked for donations passed into the store.

About 4 to 6 minutes after Sena commenced his leaflet distribution, one of the stores' management personnel appeared and told Sena to get away from the property. He ''shoved'' Sena and ''tried to take the leaflets out of [his] hand.'' He said that if Sena did not leave he was going to call the police. Sena suggested to him ''that he do that, because [his] civil rights were being violated.'' According to Sena, he continued to pass leaflets to customers but the management personnel ''was ripping the leaflets out of the customers hands and telling them they're all lies and . . . he [don't] belong here, the police have been called.''

The police appeared and told Sena that he was ''not allowed to be on the Company's property, that it was private property, and if [he] did not leave, that [he] would be arrested for trespassing.'' Sena protested, the police officer insisted; Sena left the stores premises.

On August 19, 1993, Ronald M. Petronella, union business agent, and Malcolm Haight commenced passing out ''Please do not Patronize'' leaflets and picketing on the ''main road'' off company property at the Torrington store. Petronella witnessed two young men, from ''Pop Warner Football soliciting monies out in front of the store'' at the front entrance. They were selling candy bars. Thereupon, union representatives proceeded to handbill in front of the store. Within 5 minutes the manager came out of the store and asked Petronella to leave. Petronella refused, ''if Pop Warner Foot-

ball can solicit here, so can I.'' The manager called the police. The police told the union representative they would have to move or they would be arrested. They left and returned to the street.

At the Seymour store on September 3, 1993, between 10 and 20 union representatives commenced passing out ''Shop in a Union Store'' leaflets ''in front of the store, in the entrance of the parking lot.'' At the time two individuals from the Knights of Columbus ''had a can and they were soliciting donations'' in front of the store.

The union representatives continued leafleting for about 10 or 15 minutes when they were accosted by store representatives who told them to get off the store's property or the police would be called. Peter J. Sena, union business representative and organizer, said, ''I had [a] right to be there and he was violating my civil rights.'' At the time, Sena was the only one distributing leaflets. Four representatives were at the entrance to the store. Some of the union representatives were wearing a placard exactly like the leaflet.

The leafleting continued as the police arrived. Sena was told by the police ''you're going to have to get off the property, this is private property . . . the owner's of the Company do not want you on the property.'' Sena told the police as long as the Knights of Columbus people had a right to be there that he had the right to be there. The Knights of Columbus person ''left the property''; Sena and the union representatives followed police instructions and left the property.

On November 5, 1993, John J. Conley, union business agent organizer for western Massachusetts and Vermont, with six to eight others handbilled the Respondent's East Longmeadow store with ''Please do not Patronize'' leaflets and picket signs. The group parked in the store parking lot and proceeded with their literature toward the store. A policeman approached them ''right away.'' He told the union representatives ''to get off the property of the Big Y, to get out of the parking lot, remove our vehicles from the parking lot or we would be subject to an arrest.'' The group walked toward the front of the store and commenced leafleting and picketing. Store supervisors appeared and talked to the police officer. The officer told the group if they did not leave he would have them arrested. The group left.

On the same date, November 5, 1993, Conley and the group followed the same procedure at the Longmeadow store. They were threatened with arrest and left.

On the same date, November 5, 1993, Conley and the group visited the St. James Avenue store in Springfield, Massachusetts. Conley observed a woman in the lobby of the store soliciting customers to sign a petition regarding abolishing the Blue Laws of Massachusetts. Thereupon Conley and the group began leafleting on company property. The manager appeared and told the group to leave the store's property or they would call the police. The police arrived. They told the group to leave or they would be arrested. The group left.

On the same date, November 5, 1993, Conley and the group went to the Respondent's store at the 16-acre Wilbraham Road section of Springfield, Massachusetts. The group proceeded to leaflet in the front of the store. A manager appeared and told the group to leave the front of the store and ''go to the road.'' Police arrived and conferred with management. The group was told if they did not move, they would be arrested. The group left.

(B) As noted above, the Knights of Columbus, Pop Warner Football, and a person soliciting signatures to a petition were permitted on store property. In addition, other groups and organizations were permitted to use the Respondent's premises, i.e., Little League, Harrington Women's Club, St. Judes Hospital, Torrington Varsity Basketball, Oxford Dog Pound Committee, Gathering Pentecostal Church, Christ Church Day School, George Hummel Little League, Starr's Library, Springfield Christian School, Longmeadow Council on Aging, Springfield Central High Key Club, Wilbraham Brownie Troupe, St. Catherine's Athletic Association, Committee to elect Attorney Barbara Green, the Lions Club, the American X-Pows, and St. Patrick's School.

Joanne LaPlante, store manager at the Longmeadow store, testified that ''allowing charitable organizations [and groups] to solicit in front of [the] store was good public relations and an opportunity to help the community,'' but ''it would hold true that having a union representative . . . in front of the store and informing customers that Big Y was non-union or was charging higher prices in comparison to other area stores would not be good for business.''

David L. Brunnells, vice president of operations, testified that the Respondent had a centralized policy regarding solicitation at its stores which was put in writing in October 1993. Prior to that time the policy had been oral. The policy required the solicitator to fill out a ''Solicitation Request Form.'' On the form guidelines were set out:

> If you wish to request space outside one of our stores read the following guidelines, complete this form and return it to the store manager for pre-approval and scheduling at least seven (7) business days prior to the activity.
>
> GUIDELINES
>
> 1. You must represent a charitable or non-profit community service organization.
> 2. Preferably one (1) or two (2), but no more than three (3) individuals can solicit for an organization at one time.
> 3. Solicitation is only available on Fridays, Saturdays and Sundays between the hours of 9:00 a.m. and 6:00 p.m. with a four (4) hour maximum time block in any 24 hour period.
> 4. No more than one (1) organization can be scheduled in a time block.
> 5. Only one pre-approved area can be utilized for solicitation (including locations with more than one entrance).
> 6. Entrances and/or exits to the store can not be impeded.
> 7. Organizations may only solicit once in a (90) day time period.
> 8. All customers must be treated with respect and aggressive behavior is prohibited.
> 9. Political solicitations or other activities are not permitted at any time.

Richard Maruca, store manager at the Respondent's Plainville, Connecticut store, described the unwritten policy: ''The unwritten policy was any charitable organization could come

in to request to sit out in front of our store and solicit for their charity. It would be written down on a calendar prior to the event. We would let them do it on Fridays, and Saturdays and Sundays. We would do it only during daylight hours. And they could be there—if it was children, they would have to be supervised by an adult, especially with the cub scouts, the girl scouts, what have you. And we would not let any more than one organization out there at any one time.'' ''[W]e wouldn't allow them more than once every 60 days.''

Labor unions were not included under the Respondent's policy. ''[T]hey were not to solicit in front of our store.''

Conclusions and Reasons Therefor

The question in this case is whether the Respondent can deny a labor union access to its premises for solicitation or picketing while at the same time it allows charitable or nonprofit community service organizations to solicit on its premises without violating Section 8(a)(1) of the Act.

In *Bristol Farms*, 311 NLRB 437, 438 fn. 8 (1993), the Board, in referring to the kind of picketing and solicitation (informational) which was engaged in in the instant case, said:

> We find it clearly protected under the second proviso to Sec. 8(b)(7)(C), which concerns picketing or other publicity for the purpose of truthfully advising the public that an employer does not employ members of, or have a contract with, a labor organization. The right of union representatives to engage in this type of activity is well established. See *D'Alessandros, Inc*., 292 NLRB 81 (1988) (union agents' 8(b)(7)(C) proviso picketing and handbilling is concerted activity within ''mutual aid or protection'' language of Sec. 7).[1]

Thus it is clear what the union attempted to do and did for short intervals was protected concerted activity which was permissible if the employer had no lawful right to bar the nonemployee representative from its premises.

In *Belcher Towing Co. v. NLRB*, 614 F.2d 88, 90 (5th Cir. 1980), the court said:

> A rule that prohibits solicitation, on company premises, by non-employee union organizers is ordinarily presumed [to be] valid and will be overturned only on a showing either that the rule discriminates against unions by allowing other solicitation[2] or that no reasonable alternative means of access to the employees exist.

That part of the rule which refers to ''disparate treatment'' was undisturbed by the Supreme Court in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). As was said by the Board in *Davis Supermarkets*, 306 NLRB 426 (1992), ''Although the Supreme Court in *Lechmere v. NLRB*, [499 U.S. 918 (1991)], rejected the Board's holding in *Jean Country*, the *Lechmere* decision does not disturb the Court's statement in *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956), that 'an employer may validly post his property . . . if [it] does not discriminate against the union by allowing other distribution.'''

Facts similar to the facts in the instant case were cited by the Board:

> On the same day that the Respondent refused to allow the pickets to remain in front of the store, it permitted a charitable organization to set up a table on the sidewalk and sell raffle tickets for a car, which was parked in the lot in front of the store. Several employees testified that they have seen church and school organizations in front of the store selling items to the Respondent's customers. [*Davis Supermarkets* at 426.]

The Board held:

> Here there is sufficient evidence that both before and during the time that the Union sought to picket in front of the Respondent's store, the Respondent allowed other organizations unlimited access to its property for sales and solicitations. At the same time, the Respondent has denied the Union the use of the same premises for handbilling and picketing purposes. Under these circumstances, we find the Respondent's conduct constituted unlawful disparate treatment of protected union activity in violation of Section 8(a)(1) of the Act. [*Davis Supermarkets* at 427.]

In the case of *Great Scot, Inc*., 309 NLRB 548 (1992), in which a union handbills ''requested customers not to shop at the Respondent's nonunion store and to patronize certain named unionized stores instead'' and in which the respondent had permitted other organizations and individuals to use its property free of charge, to solicit contributions and sell items, the Board applied the ''disparate treatment'' analysis of protected union activity, and found a violation of Section 8(a)(1) of the Act. See also *Richards United Super*, 308 NLRB 201 (1992); *Food Lion, Inc*., 304 NLRB 602 (1991); *D'Alessandro's, Inc*., supra; and *Ordman's Park & Shop*, 292 NLRB 953 (1989).

The evidence here establishes that the Respondent, by its rule, and the implementation of the rule, barred union representatives from the use of its premises for informational picketing and solicitation while allowing other organizations and groups in accordance with the rule to freely use its premises. Under these circumstances the Respondent's conduct constituted unlawful disparate treatment of protected union activity in violation of Section 8(a)(1) of the Act.[3]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act,

[1] In *D'Alessandro's, Inc*., supra at 83, the Board opined:

> [W]e find that the Union's picketing and handbilling to inform the public that the Respondent was nonunion was conducted, at least in part, on behalf of employees of those unionized stores that the Respondent's customers were being asked to patronize. That clearly is concerted activity that falls with the ''mutual aid or protection'' language of Section 7.

[2] The court states ''a no-solicitation rule is discriminatory only if the employer allows non-union *solicitation* (for example, solicitation by charitable organizations).'' Ibid.

[3] As claimed by the Respondent, credible evidence does not support a finding that the union representatives' conduct barred them from use of the Respondent's premises. Moreover, the reason that the Respondent excluded union representatives from its property was not because of any alleged misconduct on the part of the representatives.

and it will effectuate the purposes of the Act for jurisdiction to be exercised.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By denying the Union access to its property for the purpose of solicitation and picketing while discriminatorily permitting charitable or nonprofit community service organizations to solicit on its property, the Respondent violated Section 8(a)(1) of the Act.

4. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having unlawfully denied the Union access to its property for the purpose of soliciting its potential customers, it is recommended that the Respondent take such action as will effectuate the purposes of the Act. It is also recommended that in order to remedy the Respondent's past unfair labor practices that the Respondent allow the Union access to its premises for the purpose of making up for those times it was denied the right to solicit and that in the future the Respondent grant the Union the same solicitation and picketing privileges on a nondiscriminatory basis that it permits to others under the rules.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Big Y Foods, Inc., Springfield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully denying access to its property for purposes of solicitation and picketing by the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Grant the Union immediate access to all the Respondent's store properties for the purpose of solicitation and picketing on a lawful nondiscriminatory basis in accordance with the remedy section of this decision and comply fully with the remedy.

(b) Post at all stores copies of attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''